U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Part 90 of the	)	PR Docket No. 93-144
Commission's Rules to Facilitate	)	RM-8117, RM-8030
Future Development of SMR Systems	)	RM-8029
in the 800 MHz Frequency Band	)	
	)	
and		
	)	
Implementation of Section 309(j)	)	
of the Communications Act --	)	PP Docket No. 93-253
Competitive Bidding	)	
800 MHz SMR	)	

Reply Comments of the Chief Counsel for Advocacy of the United States Small Business Administration on the Further Notice of Proposed Rulemaking

---

Jere W. Glover, Esq.
Chief Counsel for Advocacy
Barry Pineles, Esq.
Assistant Chief Counsel
Office of Advocacy
United States Small Business Administration
409 3rd Street, S.W.
Washington, DC 20416
(202) 205-6532

March 1, 1995

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Part 90 of the	)	PR Docket No. 93-144
Commission's Rules to Facilitate	)	RM-8117, RM-8030
Future Development of SMR Systems	)	RM-8029
in the 800 MHz Frequency Band	)	
and		
Implementation of Section 309(j)	)	
of the Communications Act --	)	PP Docket No. 93-253
Competitive Bidding	)	
800 MHz SMR	)	

Reply Comments of the Chief Counsel for Advocacy of the United States Small Business Administration on the Further Notice of Proposed Rulemaking

---

The Office of Advocacy already filed extensive comments in this proceeding. In those comments, the Office of Advocacy strongly urged the Commission to develop an auction and licensing regime that assisted small specialized mobile radio (SMR) service providers rather than one or a few SMR providers seeking to offer cellular telephony-like services. The Office of Advocacy stands by those comments and has seen nothing in the record that dissuades us from reiterating the views expressed in those comments. However, there were some issues that the Office of Advocacy believes need further clarification.

First, despite the contentions of the primary proponent of the Commission's proposal in the further notice of proposed rulemaking (FNPR), the Office of Advocacy reviewed the record and found that the vast majority of the current incumbents in the SMR industry have no interest in providing enhanced or digital service. Almost all small SMR providers, including those represented by SMR WON, are adamantly opposed to the Commission's proposal. The Office of Advocacy believes that adoption of the proposals in the rulemaking without serious modification, in light of the record, could be construed as arbitrary and capricious rulemaking.[1]

Second, the Office of Advocacy stated in its comments "that auctions represent the most efficient mechanism for resolving disputes among mutually exclusive applications."[2] The Office of Advocacy continues to hold that view. However, after a detailed examination of the record, the Office of Advocacy now believes that auctioning spectrum in the 800 MHz, while efficient, may not be in the public interest. In particular, the Office of Advocacy concurs with the assessment of SMR WON[3] that Congressional authorization of auctions did not enable the Commission to auction spectrum already allocated to existing licensees. Therefore, the Office of

---

[1] *E.g.*, Brookings Mun. Tel. Co. v. FCC, 822 F.2d 1153, 1169 (D.C. Cir. 1987); Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 746 (D.C. Cir. 1986); National Black Media Coalition v. FCC, 775 F.2d 342, 357 (D.C. Cir. 1985).

[2] Comments of the Chief Counsel for Advocacy at 11.

[3] Comments of SMR WON at 30-32.

Advocacy urges the FCC not to adopt its current proposal to auction already licensed spectrum. Should the Commission decide to auction spectrum in the 800 MHz band, the Office of Advocacy reiterates that the FCC adopt the suggestions made in our original comments to ensure that designated entities, including small businesses, are not foreclosed from SMR opportunities.

Third, an inconsistency between the Commission's processing of SMR licenses and language in the proposed rules could make it impossible for certain SMR licensees to operate. The Commission announced that it would suspend processing of SMR applications filed after August 9, 1994. On November 22, 1994, the FCC reversed that position and is processing and awarding licenses for applications submitted after the August 9, 1994 date. In the interim, the Commission issued the FNPR and utilized the August 9, 1994 suspension date in proposed regulatory language. Thus, SMR applicants awarded licensees after August 9, 1994 would not be able to transfer channels (§§ 90.7(e) and 90.667), would not be able to utilize channels 400-600 (§ 90.617(d)), and would not be eligible for extended implementation periods (§ 90.629).[4] The Office of

[4] Proposed § 90.629 creates an anomaly. Under the Commission's proposal, wide-area licensees would be eligible for extended implementation periods. However, any system licensed after August 9, 1994, such as those obtained through auction would not be eligible for the extended implementation period. The Office of Advocacy, even though it does not support the limitation of extended implementation solely to wide-area licensees, cannot believe that the Commission wishes to limit the availability of extended implementation plans only to SMR systems currently licensed.

Advocacy does not believe that the Commission intended to create two classes of SMR licensees; rather, the Office of Advocacy believes that the timing of the FNPR and the reversal of its suspension created this anomalous situation. The Office of Advocacy strongly urges the FCC to correct this situation by removing the references to licenses issued prior to August 9, 1994.

Respectfully submitted,

Jere W. Glover, Esq.
Chief Counsel for Advocacy

Barry Pineles, Esq.
Assistant Chief Counsel

---

believe that the Commission wishes to limit the availability of extended implementation plans only to SMR systems currently licensed.